In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-662

GARY MELVIN GILMORE AND
DONALD DAY BROWN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their warrantless arrests were not supported by probable cause and that marijuana seized during the arrests therefore should have been excluded from evidence at trial.

Following a jury-waived trial on stipulated facts in the United States District Court for the Southern District of California, petitioners were convicted of having conspired to possess and having possessed marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Gilmore was sentenced to concurrent terms of three years' imprisonment, with provision for parole under 18 U.S.C. 4208(a)(2), to be followed by a special parole term of five years. Petitioner Brown was sentenced to concurrent terms of fifteen months' imprisonment, with provision for parole under 18 U.S.C.

4208(a)(2), to be followed by a special parole term of three years. The court of appeals affirmed (Pet. App. A 1-2).

1. In late March of 1974, agents of the San Diego County Integrated Narcotics Task Force (NTF)[1] were advised by Connecticut police that marijuana debris was known to be in the luggage of John Mitchell, who was flying to San Diego. Upon Mitchell's arrival in San Diego, NTF agents followed him to petitioner Gilmore's house, where they undertook a surveillance. When Mitchell left Gilmore's house on April 6, 1974, the agents noted that he was carrying more suitcases than when he arrived. They relayed this information to Connecticut police, who arrested Mitchell that same day in Connecticut with approximately 160 pounds of marijuana in his possession (Tr. 5-6).

Mitchell agreed to cooperate with an NTF investigation of his marijuana suppliers on the condition that his cooperation be revealed to the Connecticut state prosecutor (Tr. 71-72). On April 30, 1974, Mitchell met with NTF agents in San Diego and advised them that Gilmore had supplied him with the marijuana that the Connecticut police had seized (Tr. 6, 97-98). The NTF agents instructed Mitchell to arrange to purchase additional marijuana from Gilmore (Tr. 7, 9-10, 97, 117-118). Accordingly, on May 1, 1974, Mitchell returned to Gilmore's house, where he would reside until May 5 (Tr. 98-101).

On May 2, 1974, Mitchell advised agents that he had placed an order with Gilmore for 230 kilograms of marijuana at a price of $30,000 (Tr. 7, 9-10, 99). Gilmore had assured Mitchell that he could supply the desired amount and boasted that only the preceding day he had "done a deal" for 500 kilos (Tr. 7).

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[1]The NTF consisted of narcotics agents from the Drug Enforcement Administration and local jurisdictions.

On the evening of May 3, 1974, Mitchell told the agents to expect a marijuana delivery at Gilmore's residence either that evening or the following morning. Accordingly, a surveillance of Gilmore's residence was established and, at approximately 9:45 p.m., Gilmore was seen entering the detached garage, turning on a light, and covering the window (Tr. 10-11, 157-159, 194-195, 198).

An automobile drove up, and the garage light went out. The garage door opened, a figure motioned the car to enter, the car drove in, the garage door closed, and a light inside was turned on. An agent who approached the garage heard voices inside. He also heard the opening of a car trunk, the apparent unloading of objects, and finally the closing of the trunk. The garage light again was turned off, the garage door opened, and the same car drove out. The car drove about 200 feet down an alley with its headlights off; the lights then were turned on, and the car sped away (Tr. 158-159).

The morning following the agents' observations of these events, May 4, 1974, Mitchell telephoned an NTF agent and reported the delivery of 95 kilograms of marijuana to Gilmore's residence the night before. Mitchell said that he had been present in the garage and had seen petitioner Brown unload the marijuana (Tr. 12). Mitchell also told the agents that on the morning of May 4, petitioner Brown had again been at Gilmore's residence and had told Mitchell that his marijuana was coming soon. Brown also had indicated to Mitchell that he was returning home to await a telephone call that would advise him that Mitchell's marijuana was ready for delivery (Tr. 11).

About 12:00 noon on May 5, 1974, Mitchell telephoned an NTF agent and advised him that Brown had just been at Gilmore's residence and had told Mitchell that his 230 kilos were in a camper a few blocks away and that the

driver would bring the marijuana any minute (Tr. 13-14, 33). Shortly thereafter, Mitchell told an agent that a black Ford pickup with a white camper, which agents had observed parked alongside the garage, had just delivered the marijuana (Tr. 14, 103-104). Mitchell stated that he had examined the marijuana and that it was packed in large cardboard boxes in Gilmore's garage.

After discussing the price and quality of the marijuana with Gilmore, in Brown's presence, Mitchell left Gilmore's residence on the pretext of taking a sample to his partners (Tr. 104, 167). Mitchell then met with an agent who instructed him to return to Gilmore's house, determine if the marijuana was still there and, if it were, to give a signal for the agents to enter (Tr. 104-105).

Pursuant to his instructions, Mitchell returned to Gilmore's house and gave the prearranged signal (Tr. 105). An officer knocked on a side door of the garage, and asked that it be opened. When the door was not opened, he knocked again and announced: "This is the police. Would you open the door" (Tr. 175-176). As someone opened the door, the officer saw a second person move swiftly inside and also heard a third individual move. He again announced that he was a police officer and stepped inside. The officer then saw Mitchell, Gilmore, and Brown and ordered them to the rear of the garage. He also observed two kilo-size marijuana bricks on a bench on the opposite side of the garage. The officer told Mitchell, Gilmore and Brown that they were under arrest (Tr. 108, 177-180).

He then saw four large cardboard boxes just inside and to the left of the door through which he had entered and could see marijuana in one partly opened box (Tr. 179-180). The four boxes contained 213 kilograms of marijuana. Four kilo-size bricks were also lying on a mattress on

the garage floor. The marijuana in the garage, a total of 219 kilograms, was immediately seized.[2]

2. Petitioners contend that their warrantless arrests were not supported by probable cause because the reliability of the informant Mitchell was not established.

While Mitchell had never before been used as an informant, the reliability of the information he supplied was established by several factors within the NTF agents' knowledge. The agents knew that Mitchell was residing at Gilmore's residence and therefore had an opportunity to see the marijuana in the garage. *United States* v. *Smith*, 503 F.2d 1037, 1039 (C.A. 9). They also knew that Mitchell had no interest in communicating false information since he was hoping that his cooperation would favorably affect the Connecticut charges against him.

Moreover, since Mitchell freely acknowledged his prior illegal purchase of marijuana from Gilmore, the agents had reliable information that recently Gilmore had trafficked in marijuana; this fact further supported Mitchell's statement that Gilmore had obtained the additional

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[2]Later, Gilmore's residence and garage were searched pursuant to a California probation order which gave consent to searches of Gilmore's residence by law enforcement officials (Tr. 110-112). The government made no use of the contraband seized from Gilmore's residence, but it did make use of 12 additional kilograms of marijuana seized from the garage; this marijuana together with the previously seized 219 kilograms formed the basis for petitioners' convictions.

The court of appeals held that the probation order did not authorize the search for and seizure of these 12 kilos of marijuana because "[t]he search was not effected by or even with the authorization of Gilmore's probation officer for a probation-related objective" (Pet. App. A 2), but that any error was harmless because the bulk of the marijuana was not seized pursuant to the probation order.

In its opinion, the court mistakenly implied that the 12 kilos of marijuana were seized from Gilmore's house (*ibid.*).

quantity of marijuana which was stored in Gilmore's garage. *United States* v. *Harris*, 403 U.S. 573, 583-584. Finally, because of their own observations, the agents also knew the underlying circumstances from which Mitchell concluded that marijuana was present in Gilmore's garage; and they therefore credited Mitchell's statement that he personally had seen the marijuana. *United States* v. *Smith*, *supra*.

The reliability of Mitchell's information was personally verified by the NTF agents when, through their own observations, they confirmed significant details of his story. See *Draper* v. *United States*, 358 U.S. 307. On the evening of May 3, 1974, Mitchell told the agents to expect a marijuana delivery at Gilmore's residence. Shortly thereafter, the agents saw an automobile drive up to Gilmore's garage and a figure motion the car to enter, which it did. An agent who approached the garage heard voices inside, the opening of a car trunk, the unloading of objects and the closing of the trunk.

The next morning, Mitchell reported that 95 kilograms of marijuana had been delivered to Gilmore's residence the night before. On the day of petitioners' arrests, Mitchell advised the agents that his marijuana would be delivered by a camper and later said that the delivery had been made by a black Ford pickup with a white camper; this information was verified when the surveillance agents saw such a truck parked near the garage. As a result of the information provided by Mitchell and its corroboration by the agents' personal observations, the agents had probable cause to arrest petitioners and seize the marijuana from the garage.

3. The failure of the NTF agents to obtain a warrant was excused by exigent circumstances. See *United States* v. *Bustamante-Gamez*, 488 F.2d 4, 7-9 (C.A. 9). The agents

were required to make the entry quickly since the marijuana had been delivered with little advance notice and because petitioners expected Mitchell (who then was in Gilmore's residence) and his partners to "come up with the money" and complete the marijuana purchase (Tr. 18). Any delay would have placed Mitchell in danger and might have enabled petitioners to destroy or flee with the marijuana. Since the agents' entry into the garage was proper, the seizure of the marijuana, which was in plain view, was proper. *Harris* v. *United States*, 390 U.S. 234, 236.

Petitioners contend that the warrantless entry was not justified by exigent circumstances because the emergency was created by the NTF agents.[3] Although courts have said that police officers may not create exigent circumstances by unreasonable and deliberate delay, the NTF agents, as we have shown, acted promptly in entering the garage once they were advised by Mitchell that the marijuana was there. Compare *United States* v. *Curran*, 498 F.2d 30, 34 (C.A. 9), and *United States* v. *Scheffer*, 463 F.2d 567 (C.A. 5), certiorari denied *sub nom. Stecher* v. *United States*, 409 U.S. 984.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[3]This contention differs from those in *United States* v. *Santana and Alejandro*, No. 75-19, certiorari granted October 14, 1975, where the issues are what circumstances justify an officer's warrantless entry of a residence to effect an arrest and whether a warrant is ever required to effect an unforced, daytime entry of a residence to effect an arrest.